AFAD SHA SDN BHD

v

SPPIK DAGANG SDN BHD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
DATO' KAMALANATHAN RATNAM JC
[SUIT NO: D5-22-1195-93]
20 MARCH 1996

CIVIL PROCEDURE: *Writ of seizure and sale – Setting aside – Writ based on default judgment obtained by company prior to its incorporation – Whether irregular – Whether unenforceable – Whether default judgment a nullity – Fresh application to set aside writ after appeal to set aside default judgment dismissed - Whether proper – Rules of High Court 1980 O. 2 r. 1(1), O. 47 r. 1.*

CIVIL PROCEDURE: *Default judgment – Setting aside – Allegation that judgment was irregularly obtained and a nullity – Whether could be set aside in collateral proceedings – Principles – Special circumstances – Inherent jurisdiction of High Court – Rules of High Court, 1980 O. 2 r. 1(1), O. 92 r. 4.*

COMPANY LAW: *Companies – Corporate entity – Unincorporated companies – Locus standi – Whether having any locus to sue and institute proceedings – Judgments obtained prior to incorporation – Whether irregular – Whether a nullity – Companies Act 1965 s. 23(6).*

COMPANY LAW: *Companies – Change in name – Ratification of pre-incorporation contracts – Principles – Companies Act 1965 ss. 23(6), 35(1).*

This was an application to set aside a writ of seizure and sale on the ground that the default judgment that preceded the issuance of the writ was a nullity and therefore unenforceable. The facts were that in November 1993 the plaintif obtained separate judgments (in default of appearance) againt both the defendants. It was not in dispute that when the judgments were obtained the plaintiff was yet to be incorporated, and so had no corporate entity. This notwithstanding, the facts showed that in the statement of claim it had filed against the defendants, the plaintiff held itself out as "sebuah syarikat sendirian berhad yang ditubuhkan di Malaysia".

In April 1994, the defendants jointly applied to set aside the judgments. The defendants were not aware of the plaintiff's non-incorporation, and the result was that in their said application they did not raise the issue that the plaintiff was not a registered company when it filed the suit. Worse still, in their affidavit in support, the defendants, rather erroneously, admitted in effect that the plaintiff was an incorporated body.

The learned Senior Assistant Registrar (SAR) dismissed the application to set aside wherefore the defendants appealed to the Judge in Chambers. In the meanwhile, the plaintiff had taken out a writ of seizure and sale to execute the judgments, and in the circumstances, having filed their notice of appeal, the defendants applied for a stay of proceedings until further order. Again, in the affidavit in support of the application for stay, no issue was raised that the plaintiff was not a registered company. Be that as it may, stay was allowed by the learned SAR whereupon the plaintiff appealed.

Abdul Malik J upheld the SAR's decision refusing to set aside the judgments in default, and following that the plaintiff withdrew the appeal in respect of the order for stay. The defendant' application for leave to appeal against the learned Judge's decision was refused by the Court of Appeal, whereupon, the defendants proceeded to file another application for stay, which was identical in terms to their previous application. In this later application, however, for the first time, the defendants averred about a search at the Registrar of Companies (ROC) which disclosed that the plaintiff was not registered with the ROC at the time it commenced the suit against the defendants. In the event, the defendants contended that stay ought to be granted as the plaintiff, by reason of its non-corporation, had no *locus stand*i to institute the suit. This application was again heard by Abdul Malik J who dismissed the application. In dismissing the application, the learned Judge, however, had not decided on the merits of the case, but rather dismissed it on the ground that since the Court of Appeal had refused to grant leave to appeal there was therefore no need to consider a stay.

The second defendant then filed the present application wherefore it sought to strike out and set aside the writ of seizure and sale. Before the learned Judicial Commissioner the second defendant repeated its contention that the plaintiff had no *locus standi* to initiate proceedings against the defendants, and that the judgments in default in question were in effect a nullity and therefore unenforceable. The plaintiff submitted that the matter, having been raised before in the stay proceedings, was already *res judicata.* The plaintiff also argued that while the judgments herein could be a nullity, it was nonetheless not open for the defendants to challenge the same in a collatoral proceeding.

The facts also showed that at all material times there was no company called "Afad Sha Sdn Bhd". What was in existence was a company called "Afad Sdn. Bhd" which was registered in 1983. What happened was that on 22 May 1995 (i.e. long after the plaintiff had instituted the suit), an extraordinary general meeting of "Afad Sdn Bhd" was held wherein a resolution was passed to change the name of "Afad Sdn Bhd" to "Afad Sha Sdn Bhd", and on 24 May 1995 the ROC approved the change. In the circumstances, the plaintiff also contended that even if the plaintiff was not a registered company at the commencement of this suit, s. 35 of the Companies Act gave it a right to ratify all the pre-incorporation acts.

Held:

[1] At the time of filling this suit there was in existence no juristic entity in the plaintiff such as to render it capable of suing and this Court ought to treat the entire proceedings as a nullity in the exercise of its inherent jurisdiction. In the circumstances, the judgments in default obtained by the plaintiff are a nullity. The filing of the defence in which the defendants had erroneously admitted that the plaintiff was a private limited company, however, cannot be treated as an admission to be held against them.

[2] The plaintiff was not incorporated pursuant to s. 16(5) of the Companies Act 1965 when the suit was filed and judgment taken. The judgment obtained by a non-existent company has formed the root of these present enforcement proceedings. Such enforcement proceedings must naturally fail.

[3] There is no distinction between an Order which is a nullity and one which is irregular and curable under O. 2 r. l(1) of RHC in respect of enforcement of the Orders. As it is, both Orders may be enforced until and unless they are set aside whether in proceedings instituted for that purpose or in collateral proceedings. However, such orders may also be set aside *ex debito justitiae* in the exercise of the inherent jurisdiction of the Court without the affected person needing to have recourse to proceedings expressly meant for that purpose.

[4] The judgments in default obtained by a non-existent company would clearly fall within the "very few rare exceptions" envisaged by the Supreme Court in *D&C Bank v. Aspatra Corp. Sdn. Bhd. & Anor*. By virtue of this authority the defendants can challenge the judgments in default by way of collateral proceedings, namely by way of this application to set aside the writ of seizure and sale.

[5] This is not a case where the plaintiff, having been properly incorporated at the time of the commencement of this suit, subsequently changed its name pursuant to s. 23(6) of the Companies Act, wherefore the new company may legally continue the proceedings already commenced by the plaintiff. Nor is this a case where the plaintiff had been Afad Sdn Bhd which subsequently changed its name to Afad Sha Sdn. Bhd, wherefore the latter may be deemed to have continued the proceedings commenced by Afad Sdn. Bhd. As neither of the aforesaid situations arose, the plaintiff's reliance on s. 23(6) of the Companies Act is rather misconceived. Clearly, s. 23(6) does not help the plaintiff in any way.

[6] The question of ratification of pre-incorporation contracts under s. 35(1) of the Act was neither pleaded nor averred in the affidavits. In any case, even if the issue was pleaded or averred, as the case may be, it could

only mean that paragraph one of the plaintiff's statement of claim is totally misleading.

[Application allowed with costs]

Cases referred to:

Asia Commercial Finance (M) Berhad v. Kawal Teliti Sdn. Bhd. [1995] 3 CLJ 783; [1995] 3 AMR SC 2559 ***(cit)***

Kelner v. Baxter [1866] LR 2 CP 170 ***(cit)***

Chip Chong Sawmill Co. Sdn. Bhd. & Ors. v. Chai Khium Fui [1978] 2 MLJ 24 ***(cit)***

Harkness v. Bell's Asbestos and Engineering, Ltd. [1966] 3 AER 843 ***(foll)***

Pembinaan KSY Sdn. Bhd. v. Lian Seng Properties Sdn. Bhd. [1991] 1 MLJ 100 ***(cit)***

Cosmic Insurance Corpn. Ltd. v. Khoo Chiang Poh [1981] 1 MLJ 61 ***(foll)***

Russian & English Bank v. Baring Brothers & Co. Ltd. [1935] 1 Ch. 120 ***(foll)***

MacFoy v. United Africa Co. Ltd. [1961] 3 All ER ***(foll)***

Re Pritchard [1963] 1 AER 873 ***(foll)***

Isaacs v. Robertson [1984] 3 All ER 140 ***(cit)***

Hadkinson v. Hadkinson [1952] 2 All ER 567 ***(cit)***

Marsh v. Marsh [1945] AC 271

Standard Chartered Bank v. Central Provident Fund Board [1989] 1 MLJ 268 ***(foll)***

Development & Commercial Bank Bhd. v. Aspatra Corp. Sdn. Bhd. & Anor. and Anor. Appeal [1995] 3 MLJ 472 ***(foll)***

Che Wan Development Sdn. Bhd. v. Co-operative Central Bank Bhd. [1989] 3 MLJ 40 ***(foll)***

Hongkong & Shanghai Banking Corp. v. Goh Su Liat Telecommunication Authority of Singapore, Garnishee [1986] 2 MLJ 86 ***(foll)***

Tengku Jaffar bin Tengku Ahmad v. Karpal Singh [1993] 3 MLJ 159 ***(foll)***

Legislation referred to:

Companies Act 1965, ss. 23(6), 35(1)

Rules of the High Court 1980, O. 2 r. 1, O. 47 r. 1(1), O. 49 r. 5, O. 70 r. 1, O. 92 r. 4

Rules of the Supreme Court, O. 24 r. 11(1)(a)

Other sources referred to:

Halsbury's Laws of England, Vol. 17, para. 451

Administrative Law, H.W.R. Wade

For the applicant – Faiz Fadzil; M/s. Wahab Rashid & Co.

For the respondent – Selvasekaran a/l S Ponniah; M/s. Husin Selva & Partners

JUDGMENT

Kamalanathan Ratnam JC:

This was an application by the 2nd defendant (Enclosure 59) to strike out and to set aside a writ of seizure and sale taken out by the plaintiff against both the defendants. The application was filed on 16 December 1995 together with a certificate of urgency and was fixed for hearing before me on 20 December 1995. However, the plaintiff's solicitors requested an adjournment to enable them to file an affidavit in reply. The matter was then adjourned to 27 December 1995.

When the matter came up before me again on 27 December 1995 the 2nd defendant's Counsel informed me that he was served with the plaintiff's reply (Enclosure 63) the day before but that because of the urgency of the matter, since the writ of seizure and sale was to be executed on 29 December 1995 he was prepared to argue the application without asking for further time to reply.

Facts Relating To This Case

The plaintiff, Afad Sha Sdn. Bhd., sued both defendants on 22 October 1993 based on an agency agreement for a sum of RM162,800 with interest and costs.

The plaintiff prefaced their statement of claim with the first paragraph stating as follows:

> 1. Plaintif adalah sebuah Syarikat Sendirian Berhad yang ditubuhkan di Malaysia dan mempunyai alamat perniagaan berdaftar di No. 2006-1A Jalan Sentul Dalam 51000 Kuala Lumpur.

As events would subsequently unfold this was a totally misleading averment as the plaintiff was never so registered at the time of filing this action and the judgment in default being taken. The plaintiff obtained judgment in default of appearance against the lst defendant on 30 November 1993 and against the 2nd defendant on 26 November 1993.

On 25 April 1994, both defendants then jointly applied to set aside the respective judgments in default (Enclosure 13). In their affidavit in support of Enlosure 13, the defendants annexed a copy of their defence which they had filed on 21 December 1993 without knowing that judgment in default had already been obtained against them. In that defence both defendants admitted to paragraph 1 of the statement of claim. The affidavit merely dealt with merits and the fact that the agency agreement was unstamped, but no issue was taken in respect of the non-existence of the plaintiff company at the time of filing this suit. The learned Senior Assistant Registrar (SAR) dismissed Enclosure 13 on 16 August 1994 and the defendants then vide Enclosure 16A appealed to the Judge in Chambers against the said decision.

After having filed the said notice of appeal the defendants also filed an application (Enclosure 19) for a stay of proceedings until further order. In their affidavit in support of Enclosure 19 the defendants averred that the plaintiff had issued out a writ of seizure and sale no: 37-40-94 with a view to executing the judgments in default obtained against both the defendants. However, the parties entered into some negotiations and a sum of RM35,000 was deposited with the defendant solicitors to be payable within a month to the plaintiff if the 2nd defendant failed to set aside the judgment in default. Again the affidavit in support of Enclosure 19 for stay stated other points of merits; no issue was yet raised that the plaintiff was not a registered company.

The learned SAR who heard Enclosure 19 allowed the stay on 12 October 1994 and the plaintiff being dissatisfied appealed to the Judge in Chambers on 17 October 1994 (Enclosure 24).

In the meantime, Enclosure 16A which was the appeal against the learned SAR's decision refusing to set aside the judgment in default against both defendants was heard by the learned Judge, Abdul Malek bin Hj. Ahmad J (as his Lordship then was) in Chambers on 8 February 1995 and having taken time to deliberate, the learned Judge dismissed the defendants' appeal with costs on 16 March 1995. That being the case, the plaintiff's solicitor sought to withdraw Enclosure 24 which was fixed for hearing on the same day on the ground that the matter was academic, the learned Judge having dismissed the appeal. The learned Judge took time to consider and on 20 March 1995, the learned Judge struck out Enclosure 24 and ordered both parties to bear their own costs.

On 3 April 1995, the relentless defendants filed yet another application (Enclosure 30) identical in terms to Enclosure 19 to stay execution of the judgments in default again. However in the affidavit in support of Enclosure 30 (Enclosure 29) the deponent, one Haji Ramli bin Abdul Ghani, who was at all material times both the director of the lst defendant and general manager of the 2nd defendant, averred for the first time that their solicitors' search at the Registrar of Companies (ROC) disclosed that the plaintiff was not registered with the ROC at the time the suit was commenced. However at all material times one Afad Sdn. Bhd. was the registered company. The deponent thus affirmed that the present plaintiff had no *locus standi* in this suit. He then contended that this constituted special circumstances for the Court to grant a stay. Enclosure 30 was set for hearing on 17 April 1995.

In the meantime the plaintiff filed an *ex parte* application (Enclosure 35) to garnish the accounts of the defendants with the Bank Bumiputra Malaysia Berhad and with the defendants' solicitors. In support of his certificate of urgency to obtain a garnishee order to show cause, the plaintiff's solicitor, Mr. Selvasekaran a/l S. Ponniah (hereinafter referred to as "Mr. Selva"), *inter alia*, stated that on 17 May 1995 the Court of Appeal had dismissed the defendants' application for leave to appeal to the Court of Appeal against Abdul Malek bin Hj. Ahmad J's (as his Lordship then was) decision of 16 March 1995. Enclosure 35 was fixed for hearing on 26 May 1995. Having obtained the order sought, Mr. Selva then personally served the order dated 26 May 1995 on both the garnishees as averred by him in his affidavit of service affirmed on 21 June 1995.

The garnishee order to show cause was heard by the SAR on 23 June 1995 and the decision was given on 24 June 1995. The garnishee order against the first garnishee was made absolute and as against the second garnishee, an order was made pursuant to O. 49 r. 5 of the Rules of the High Court 1980

(RHC) that is, that the judgment creditor and the second garnishee be made plaintiff and defendant respectively to decide on the issue as to whether there was any debt due or accruing if any and the amount, from the judgment debtor to the garnishee, and as to what amount, if any, was to be paid into the second garnishee's account by the defendants in the main suit.

After the decision was given by the learned SAR, one Abdul Fatah b. Mohd. Amin, a director of the lst defendant and executive director of the 2nd defendant affirmed an affidavit (Enclosure 41) similar to that in Enclosure 29 in support of Enclosure 35 and also exhibited the same documents obtained from the ROC, as that in Enclosure 29. The search disclosed that Afad Sdn. Bhd. was registered on 31 March 1983. However on 22 May 1995 an extraordinary general meeting of Afad Sdn. Bhd. was held wherein a resolution was passed to change the name of Afad Sdn. Bhd. to "Afad Sha Sdn. Bhd." and on 24 May 1995 the ROC approved the change, some 19 months after the commencement of this suit. Abdul Fatah questioned the plaintiff's motive for the sudden change in name.

The defendants then by way of Enclosure 44 filed an application to set aside the garnisnee order to show cause, the garnishee order absolute dated 24 June 1995 and the order dated 24 June 1995 for the determination of debt between the second garnishee and the judgment debtor on 27 June 1995. The plaintiff challenged Enclosure 44 on the basis that there ought to have been an appeal to the Judge in Chambers and that this procedure to apply to set aside was wrong in law. This challenge was made by way of an application (Enclosure 48) to strike out Enclosure 44 and for a further order that the plaintiff be exempted from filing an affidavit in reply to Enclosure 44.

On 10 August 1995 Abdul Malek bin Hj. Ahmad J (as his Lordship then was) heard arguments regarding Enclosures 30, 44 and 48 and gave his decision on 4 October 1995. After the decision on 4 October 1995, the defendant made the instant application before me to strike out the writ of seizure and sale no. 37-93-95 (Enclosure 59). The affidavit of the defendants (Enclosure 58) reiterated the same arguments referred to in the earlier proceedings and maintained the defendants' stand that the plaintiff had no *locus standi* in this suit. The defendants then urged this Court to exercise its inherent powers to prevent the plaintiff from abusing the process of the Court. The defendants also contended that the present plaintiff had been guilty of misrepresentation in that it had held itself out as a registered company when it was not at the material time.

The plaintiff through its director, Dr. N.A. Akbar Shah b. Abdul Rahman, affirmed an affidavit in reply (Enclosure 63) contending that this Court had no power to grant the order prayed for in Enclosure 59. The said deponent gave notice through the said affidavit that he intended to rely on all applications, affidavits, judgments and orders and other related documents in respect of this

case filed in Court, in support of his affidavit. It was the contention of the plaintiff that in the defendants' earlier application to set aside the judgment in default they had not raised the issue that the plaintiff was not an incorporated body at the time the suit was filed. The plaintiff also exhibited the proposed defence wherein in respect of paragraph 1 of the statement of claim the defendants had admitted that the plaintiff was a private limited company at the material time. On this issue I hold that if this Court finds that the judgment obtained was a nullity then the filing of the defence in which the defendants had erroneously admitted the same cannot be treated as an admission to be held against the defendants. The deponent, whilst confirming that Abdul Malek bin Hj. Ahmad J (as his Lordship then was) had on 4 October 1995 dismissed the defendants' application (Enclosure 30), had failed to state that the learned Judge had dismissed Enclosure 30 without deciding on the merits of the application and that his Lordship had dismissed it on the ground that since the Court of Appeal had refused to grant leave to appeal there was therefore no need to consider a stay. This issue raised its serpentine head again when the plaintiff's Counsel began submitting that the matter was *res judicata.* I shall revert to that later.

In any event, the deponent contended that even if the plaintiff was not a registered company at the commencement of this suit, s. 35 of the Companies Act 1965 gave it a right to ratify all pre-incorporation acts.

It is to this affidavit that the defendants stated they could not reply due to constraints of time as the execution proceedings were due and they could not take the chance of adjourning in order to affirm a reply.

By consent Mr. Selva agreed to submit first on the preliminary issues of *res judicata* and estoppel because if the Court was with him on those twin issues then there would be no need for the Court to hear further arguments.

Plaintiff's Preliminary Submission

(a) *Res Judicata*

Mr. Selva submitted that the fact that the plaintiff was not registered at the time of filing of this suit was fully argued before Abdul Malek bin Hj. Ahmad J (as his Lordship then was) and that although full submissions were made in respect of this for the first time whilst arguing the defendants' second application for stay (Enclosure 30), the learned Judge refused to grant an order in terms of the said application.

In the light of the submissions made before me and Mr. Selva's reliance on *res judicata* it became necessary for me to have the notes of evidence of the proceedings before Abdul Malek bin Hj. Ahmad J (as his Lordship then was) certified by his secretary. I reproduce herewith the transcript of Abdul Malek bin Hj. Ahmad J's (as his Lordship then was) notes when he gave his decision on 4 October 1995:

4 Oktober 1995 **Dalam Kamar**

Mahkamah:

Mahkamah telah meneliti perkara ini dan berpendapat bahawa oleh kerana rayuan ke Mahkamah Rayuan telah ditolak atas soal prosidur, tiada sebab untuk apa-apa penggantungan perlaksanaan diberi. Oleh itu, permohonan di kandungan 30 ditolak dengan kos. Mengenai kandungan 44, ianya sepatutnya didengar di hadapan Penolong Kanan Pendaftar dan oleh kerana ini disebabkan oleh kesilapan Mahkamah sendiri, Mahkamah menghantarkannya ke Penolong Kanan Pendaftar untuk didengar pada tarikh yang akan ditetapkan sungguhpun hujahan telah dibuat di hadapan Hakim. Tiada perintah kos. Dalam keadaan demikian, kandungan 48 hendaklah ditolak tanpa perintah kos.

Encik Selva:

(1) matters had been heard before Senior Assistant Registrar but he did not give decision against second garnishee;

(2) he remitted matter to the Judge;

(3) I produce the two orders dated 24 June 1995;

(4) Syarikat Seng Lian Trading v. Roy (Malaysia) Sdn. Bhd. [1978] l MLJ 221;

(5) enclosure 44 should be before Judge as notice of appeal not summons in chambers.

Encik Faiz Fadzil:

(1) I am only raising issue of nullity on enclosures 44 and 46.

Court adjourns further decision to 9 October 1995.

(t.t)

(Dato' Haji Abdul Malek bin Hj. Ahmad)

9 Oktober 1995 **Dalam Kamar**

(kandungan 30) (perakuan segera)

(kandungan 44) (perakuan segera)

(kandungan 48)

Encik Faiz Fadzil, mewakili defendan.

Encik Selva mewakili plaintif.

Mahkamah:

Keputusan yang diberi pada 4 Oktober 1995 dikekalkan. Kandungan 44 dihantar balik ke Penolong Kanan Pendaftar untuk sambung bicara terhadap garnisi kedua. Untuk garnisi pertama, defendan hendaklah membuat rayuan terhadap keputusan

Penolong Kanan Pendaftar. Mengenai kandungan 48 ianya ditolak tanpa kos terhadap garnisi kedua dan dibenarkan tanpa kos terhadap ganisi pertama.

(t.t.)

(Dato' Haji Abdul Malek bin Haji Ahmad)

The Court then asked Mr. Selva a specific question which reads:

On what basis did the Court dismiss the application since clearly your clients were not the proper parties to the action when judgment was taken?

Mr. Selva's response was that the plaintiff had submitted on s. 35 of the Companies Act 1965 in that the pre-incorporation contracts were ratified by the plaintiff after incorporation. He reiterated that this matter was fully argued before the learned Judge. It was his submission that Enclosure 59 and the supporting affidavit (Enclosure 58) raised identical issues raised in Enclosure 30 (and the supporting affidavit Enclosure 29) which was decided upon by Abdul Malek bin Hj. Ahmad J (as his Lordship then was). He relied on *Asia Commercial Finance (M) Berhad v. Kawal Teliti Sdn. Bhd.* [1995] 3 AMR SC 2559 at 2572, 2574 and contended that the principle of *res judicata* applied to preclude the defendants from reagitating the same issue.

(b) *Objections on Procedure*

His second attack was procedural. It was his contention that the procedure adopted by the defendants in applying to set aside the writ of seizure and sale was wrong. He referred the Court to O. 47 r. 1(1) RHC and contended that the only step the defendants ought to have taken was to stay the execution of the judgment or order. He argued that this Court had no power to either strike out or to set aside the writ of seizure and sale.

Defendant's Preliminary Submission

It was the submission of Encik Faiz for the defendants that when Abdul Malek bin Hj. Ahmad J (as his Lordship then was) rejected his application for stay (Enclosure 30) he had said clearly that since there was no appeal pending (as the Court of Appeal had already dismissed the defendants' application for leave to appeal to the Court of Appeal) there was no basis to continue with the hearing of Enclosure 30. He contended that therefore the issue of *locus standi* of the plaintiff was not decided at that time.

At this stage since both parties were at diametrically opposed views on this it became necessary for the Court to read the minutes of the entry of the Court file on 4 October 1995. I read aloud the minutes as produced above for both Counsel to hear. The minutes showed that the learned Judge did not make a decision even though he heard submissions and he dismissed the application on the basis that since there was no appeal there was no reason for a stay

to be granted. It must be noted that the learned Judge had heard arguments and reserved judgment. However, before he could decide the Court of Appeal had already dismissed the defendants' motion.

On this issue alone I decided that there was no question of the principle of *res judicata* being applicable and ruled against the plaintiff in its preliminary submission. I then called upon Encik Faiz to address me fully on his application.

Defendants' Main Submission

Encik Faiz pointed out that there was also no denial by the plaintiff that:

(1) there was no company called "Afad Sha Sdn. Bhd." at the commencement of these proceedings;

(2) judgments in default were taken on 26 November 1993 and 30 November 1993 against the lst and 2nd defendants respectively by a non-existent company;

(3) the name of another company had been changed to the name of the plaintiff;

(4) that the other company had held an EGM on 22 May 1995 to change the name to "Afad Sha Sdn. Bhd.", which was then approved by the ROC on 24 May 1995.

Encik Faiz submitted that based on these four facts it cannot be denied that the action had been commenced by a non existent company. He referred me to s. 16(5) of the Companies Act 1965 which reads:

> 16. (5) On and from the date of incorporation specified in the certificate of incorporation but subject to this Act the subscribers to the memorandum together with such other persons as may from time to time become members of the company shall be a body corporate by the name contained in the memorandum capable forthwith of exercising all the functions of an incorporated company and of suing and being sued and having perpetual succession and a common seal with power to hold land but with such liability on the part of the members to contribute to the assets of the company in the event of its being wound up as provided by this Act."

He therefore submitted that only after incorporation could the plaintiff sue and since they had sued prior to incorporation the judgment obtained on which execution by way of seizure and sale was based was devoid of any solid legal basis. Since the judgment taken was a nullity, this writ of seizure and sale ought therefore to be struck out.

Encik Faiz then reviewed the facts which I have earlier narrated in extensio. In addition, Encik Faiz also elaborated on both the applications filed by him to the Court of Appeal for leave to appeal. The first application for leave was purely on the merits and no issue was taken as to the non-existence of the

plaintiff at the time of suing. The Court of Appeal dismissed the application saying that it lacked merits. He then filed a second application to the Court of Appeal for leave and this time mentioned the fact of the non-existence of the plaintiff at the time of suing. He further submitted that the Court of Appeal had rejected this application as it felt that the earlier application had put paid to this issue. And since Abdul Malek bin Hj. Ahmad J (as his Lordship then was) had not decided on this issue, but merely dismissed the application on the basis that there was no longer an appeal he was compelled to file this application, that is Enclosure 59. At this point I have to state that Mr. Selva did not object or dispute to any of these facts as occurring before the Court of Appeal.

Plaintiff's Main Submission

The main thrust of the plaintiff's argument was to question the rule or order under which Enclosure 59 had been brought before this Court. It was Mr. Selva's argument that this Court had no power to set aside a writ of seizure and sale at all unless there was a breach of the RHC in the issuance of the writ of seizure and sale or any proceedings subsequent to that.

The plaintiff relied on O. 2 r. 1 RHC and contended that any misgivings in respect of their conduct ought to be treated as an irregularity. If the Court accepted the fact that there had been non compliance of the requirements of the Rules of the High Court, only then can the Court, it was argued, proceed to entertain an objection to set aside.

It was further argued on behalf of the plaintiff that nowhere in any of the affidavits was there a contention of non compliance with O. 46 or O. 47 of RHC. Since there was no averment as to which rule of the above referred to Orders had been breached, it was argued by the plaintiff that Enclosure 59 was totally misconceived. Mr. Selva referred me to *Halsbury's Laws of England* Vol. 17 para 451 which says:

> The Court does not, however, have an inherent jurisdiction over all judgments or orders which it has made under which it can stay execution in all cases. On the contrary, the court's inherent jurisdiction to stay the execution of a judgment or order is limited in its extent, and can only be exercised on grounds that are relevant to a stay of the enforcement proceedings themselves, and not to matters which may operate as a defence in law or relief in equity, for such matters must be specifically raised by way of defence in the action itself. The special circumstances which entitle the Court to stay execution of a money judgment are circumstances which go to the enforcement of the judgment and not those which go to its validity or correctness.

He further argued that this objection as to its *locus standi* cannot be raised during the writ of seizure and sale stage but that it ought to be raised at the substantial trial or at the hearing of the application to set aside. He contended

that the defendants were estopped from re-agitating this same issue which had been disposed off with finality.

The plaintiff relied on s. 23(6) of the Companies Act 1965 to support its argument that the commencement of the suit had been continued by the new company after incorporation. Section 23(6) of the Companies Act reads as follows:

> 23.(6) A change of name pursuant to this Act shall not affect the identity of the company or any rights or obligations of the company or render defective any legal proceedings by or against the company, and any legal proceedings that might have been continued or commenced by or against it by its former name may be continued or commenced by or against it by its new name.

To my mind, the fallacy of relying on s. 23(6) is abundantly clear. If the plaintiff had been incoporated at time of commencement of this suit and then changed its name, pursuant to s. 23(6) of the Companies Act 1965, the new company may continue the legal proceedings already commenced by the plaintiff. Or, if the plaintiff had been Afad Sdn. Bhd. which changed its name subsequently to Afad Sha Sdn. Bhd., then the new company, i.e. Afad Sha Sdn. Bhd., may be deemed to have continued the proceedings commenced by Afad Sdn. Bhd. As the facts stood, neither of the above two mentioned situations arose in this case and I accordingly held that s. 23(6) does not help the plaintiff in any way.

The plaintiff also relied on s. 35 of the Companies Act 1965. Section 35(l) provides as follows:

> (1) Any contract or other transaction purporting to be entered into by a company prior to its formation or by any person on behalf of a company prior to its formation may be ratified by the company after its formation and thereupon the company shall become bound by and entitled to the benefit thereof as if it had been in existence at the date of the contract or other transaction and had been a party thereto.

He then relied on *Ford's Principles of Corporations Law* 6th Ed. (1992) and submitted that the cases relied on by the defendants cannot apply to this country because of s. 35 of the Companies Act 1965 as there was no equivalent provision in the English Companies Act 1948. He therefore submitted that the rule in *Kelner v. Baxter* [1866] LR 2 CP 170 that there is no principle justifying inevitable creation of personal liability on a person who enters a contract for a 'principal' not yet in existence, continued to govern English decisions relating to the pre-incorporation contracts.

Reply

In reply Encik Faiz referred me to *Chip Chong Sawmill Co. Sdn. Bhd. & Ors. v. Chai Khium Fui* [1978] 2 MLJ 24 wherein Lee Hun Hoe CJ said at page 25:

> ... Quite apart from and independent of all specific practice rules, the High Court has an inherent jurisdiction to dismiss or stay or otherwise nullify all actions or proceedings which are shown to its satisfaction to be vexatious or oppressive, or to constitute an abuse of its process ...

He also invited the Court to apply O. 92 r 4 of the RHC. He also submitted that no resolution had been presented to show the said ratification, if any.

Although the plaintiff had no further right of reply yet in the interest of justice I allowed Mr. Selva a further reply.

In the course of his reply he referred me to *Harkness v. Bell's Asbestos and Engineering, Ltd.* [1966] 3 AER 843 and *Pembinaan KSY Sdn. Bhd. v. Lian Seng Properties Sdn. Bhd.* [1991] 1 MLJ 100 and took the view that there is no longer a distinction between judgments that are a nullity or those that are irregular and that any judgment issued by the Court ought to be obeyed and was to be treated as regular until set aside. He further argued that the defendants ought to apply to set the judgment aside if there was a patent defect or an allegation of irregularity. The defendants cannot attack the judgment in collateral proceedings.

Upon consideration of the submissions, I find that the ratification of the pre-incorporation contract was neither pleaded nor averred in the affidavits. Besides if this was the plaintiff's contention then paragraph 1 of its statement of claim is totally misleading. In short, the plaintiff has been hoisted with his own petard.

In any event, the plaintiff cannot by any stretch of the imagination, however thinly it be stretched, satisfy the requirements as envisaged by Lord Roskill in *Cosmic Insurance Corpn. Ltd. v. Khoo Chiang Poh* [1981] 1 MLJ 61, 63 when his Lordship said:

> Their Lordships note three things about this sub-section. First, so far as presently relevant before s. 35(l) can be successfully invoked the alleged "contract or other transaction" must purport to have been entered into "by any person on behalf of a company prior to its formation". Secondly, it is only after that first condition is satisfied that such a contract "may be ratified by the company after its formation ...". Thirdly, it is only if both those conditions are satisfied that such a contract upon such ratification is ante-dated to the date when it first purported to have been made.

I hold that at the time of filing this suit there was in existence no juristic entity capable of suing and by parity of reasoning this Court ought to treat the entire proceedings as a nullity in the exercise of its inherent jurisdiction if the defendants were minded to apply to set aside the writ itself. For the moment, I have to confine myself to allowing this application to set aside this writ of seizure and sale which is based on a judgment which I consider a nullity. I shall revert subsequently as to whether I can hold a judgment a nullity in collateral proceedings.

Russian & English Bank v. Baring Brothers & Co. Ltd. [1935] 1 Ch. 120, illustrates the position of a nonexistent plaintiff and its right to sue. The facts are as follows:

> A bank incorporated in Russia in 1910 established a branch in London in 1915. The bank was dissolved by the laws of Russia in January, 1918. The London branch of the bank brought an action in 1921 to recover two sums of money alleged to be moneys of the plaintiff bank in the hands of the defendant bank. This action was stayed in 1932 by an order of the Court ([1932] 1 Ch. 435) on the ground that the plaintiff company no longer existed. A compulsory winding-up order of the company was subsequently made under s. 338 of the Companies Act, 1929, and it was afterwards held by Bennett J ([1934] Ch. 276) that s. 338 did not operate to revive the plaintiff bank for the purposes of the action which had been stayed by order of the Court in 1932. The liquidator having obtained the leave of the Court brought an action under s. 191 in the name and on behalf of the company to recover the same two sums of money:

Clauson J said at page 125:

> ... all I have to deal with is the present position, in which I have before me an action by a non-existent plaintiff.;

and at page 126 he said:

> ... it seems to me to be impossible for me to hold that this nonexistent plaintiff can, as matters stand, sue.

With respect, I agree with the above principle and applying it in the present case where the plaintiff was only incorporated on 24 June 1995, I hold that the plaintiff was non-existent and cannot sue. As such, the judgments in default obtained by it are a nullity.

Is There a Distinction Between An Order Irregularly Obtained and An Order Which Is a Nullity Vis-a-vis Enforcement Of The Said Order?

In *MacPoy v. United Africa Co., Ltd.* [1961] 3 All ER 1169 Lord Denning whilst sitting in the Privy Council said this at pages 1172, 1173:

> ... If an act is void, then it is in law a nullity. It is not bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court

> declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse. So will this judgment collapse if the statement of claim was a nullity. But if an act is only voidable, then it is not automatically void. It is only an irregularity which may be waived. It is not to be avoided unless something is done to avoid it. There must be an order of the Court setting it aside: and the Court has a discretion whether to set it aside or not. It will do so if justice demands it but not otherwise. Meanwhile it remains good and a support for all that has been done under it.

Then in *Re Pritchard* [1963] 1 AER 873 the Court of Appeal again had the opportunity to review this distinction. The facts of the case were as follows:

> An originating summons under the Inheritance (Family Provision) Act, 1938, was sealed in and issued out of the Pontypridd District Registry instead of the Central Office as required by RSC, O. 54, r. 4B. The defendants entered appearances and did not take objection to the issue of the summons. The validity of the summons was subsequently raised by the district registrar; at that date the period within which proceedings under the Act of 1938 could be begun had expired. By RSC, O. 70, r. 1, non-compliance with any rule of Court did not render any proceedings void unless the Court or Judge so directed. There was no mention of an originating summons in the Supreme Court of Judicature (Consolidation) Act, 1925, which, by s. 225, defined an action as a civil proceeding "commenced by writ or in such other manner as may be prescribed by rules of Court." RSC, O. 54, r. 4B, provided that an originating sumons "shall be sealed in the Central Office ... and when so sealed shall be deemed to be issued.

In deciding the above case, Lord UpJohn LJ was of the view that the authorities established three classes of proceedings which are nullities, *viz.* (1) proceedings which ought to have been served but have never come to the notice of the defendant (but this does not include cases of substituted service or services by filing in default or cases where service has properly been dispensed with); (2) proceedings which have never started at all owing to some fundamental defect in issuing the proceedings, and (3) proceedings which appear to be duly issued but fail to comply with a statutory requirement.

However Lord Denning who gave the dissenting judgment was of the view that there had not been any commencement of proceedings, for the originating summons had not been issued out of the Central Office as required by RSC, O. 54 r. 4B, which was in mandatory terms, and the originating summons was a nullity; there was not a mere irregularity but a fundamental defect, which the defendants could not waive, to which RSC, O. 70 r. 1, did not apply, and for which no rule of Court provided a remedy.

It is interesting to note that it was after *Re Pritchard* that the English RSC was amended to include a new O. 2 r. 2 which is *pari materia* to our present O. 2 r. 1(l) of the RHC which reads:

> 1(1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of any thing done or left undone, been a failure to comply with the requirements of these rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein.

In other words, cases such as *Re Pritchard* would no longer fall under the category of nullity.

In *Harkness's* case the Court relied on RSC O. 2 r. 1 and held that a failure to comply with a provision of the RSC rule did not render the application a nullity but amounted only to an irregularity unlike in *Re Pritchard* where for a similar reason the Court held it to be a nullity and not an irregularity. Lord Denning MR said at pages 845, 846:

> In my opinion, therefore, Blain J, was in error, and so was James J. This new rule does away with the old distinction between nullities and irregularities. Every omission or mistake in practice or procedure is henceforward to be regarded as an irregularity which the Court can and should rectify so long as it can do so without injustice. It can at last be asserted that.
>
> > it is not possible ... for an honest litigant in Her Majesty's Supreme Court to be defeated by any mere technicality, any slip, any mistaken step in his litigation.
>
> That could not be said in 1963; see *Re Pritchard* (decd.); but it can be in 1966. The new rule does it.

When Lord Denning referred to doing away with the distinction between nullities and irregularities it must follow that he had confined himself to cases where the rules applied. In such instances no doubt O. 2 r. 1 puts paid to such distinction between nullities and irregularities. It was not meant to remove totally the distinction between nullity and irregularity. The misconception of learned Counsel for the plaintiff in his understanding of the *Harkness's* case is further compounded when he relied on *Pembinaan KSY* and two other cases referred to in that case, namely *Isaacs v. Robertson* [1984] 3 All ER 140 and *Hadkinson v. Hadkinson* [1952] 2 All ER 567.

The principle that was laid down by the Supreme Court in *Pembinaan KSY* was that a judgment whether one which was null and void or one which was irregular was a good and enforceable judgment until set aside. The learned Judge at page 17 of his judgment concluded that the judgment in default:

> ... was irregularly entered independent of the RHC and should be set aside *ex debito justitiae.*

As such, he held that since the judgment was a nullity the company had the option to ignore it or go to Court to set aside. With respect, the Supreme Court reversed the decision of the learned Judge at page 101 and held that:

> ... the conclusion of the learned Judge was in our view misconceived.

The Supreme Court at page 102 set out the correct legal position as follows:

> The default judgment in this case until set aside is a good and enforceable judgment. The correct law on this issue is as stated in *Isaacs v. Robertson* [1984] 3 All ER 140, where the headnote reads:
>
> > Orders made by a Court of unlimited jurisdiction in the course of contentious litigation are either regular or irregular. It is misleading to seek to draw distinction between orders that are 'void', in the sense that they can be ignored with impunity by those persons to whom they are addressed, and orders which are 'voidable', in the sense that they may be enforced until set aside, since any order must be obeyed unless and until it is set aside and there are no orders which are void *ipso facto* without the need for proceedings to set them aside.

In the speech of Lord Diplock (in *Harkness)* reference was made to the passage in the judgment of Romer LJ in *Hadkinson v. Hadkinson:*

> It is the plain and unqualified obligation of every person against, or in respect of, whom an order is made by a Court of competent jurisdiction to obey it unless and until that order is discharged.

Since Mr. Selva also relied on the two cases cited by the Supreme Court it is meet that I look into them.

In *Isaacs v. Robertson* [1984] 3 All ER 140 the respondents obtained an injunction against the appellant to restrain the latter from trespassing on a parcel of land. No application to set aside the order granting the injunction had been made. The main attack by the appellant was based on the contention that as a consequence of the operation of O. 24 r. 11(l) (a) of the Rules of the Supreme Court of Saint Vincent the order made by the High Court granting the interlocutory injunction was a nullity and that disobedience to it could not constitute a contempt of Court. Lord Diplock in giving the decision of the Court said at page 143:

> Their Lordships, would, however, take this opportunity to point out that in relation to orders of a Court of unlimited jurisdiction it is misleading to seek to draw distinctions between orders that are 'void' in the sense that they can be ignored with impunity by those persons to whom they are addressed, and orders that are 'voidable' and may be enforced unless and until they are set aside. Dicta that refer to the possibility of there being such a distinction between orders to which the description 'void' and 'voidable' respectively have been applied can be found in the opinions given by the Judicial Committee of the Privy Council in *Marsh v. Marsh* [1945] AC 271 at 284 and *MacFoy v. United Africa Co. Ltd.*

[1961] 3 All ER 1169, [1962] AC 152; but in neither of those appeals nor in any other case to which Counsel has been able to offer their Lordships has any order of a Court of unlimited jurisdiction been held to fall in a category of Court orders that can simply be ignored because they are void *ipso facto* without there being any need for proceedings to have them set aside. The cases that are referred to in these *dicta* do not support the proposition that there is any category of orders of a Court of unlimited jurisdiction of this kind: what they do support is the quite different proposition that **there is a category of orders of such a Court which a person affected by the order is entitled to apply to have set aside *ex debits justitiae* in the exercise of the inherent jurisdiction of the Court without his needing to have recourse to the rules that deal expressly with proceedings to set aside orders for irregularity and give to the Judge a discretion as to the order he will make.** The Judges in the cases that have been drawn the distinction between the two types of orders have cautiously refrained from seeking to lay down a comprehensive definition of defects that bring an order into the category that attracts *ex debito justitiae* the right to have it set aside, save that specifically it includes orders that have been obtained in breach of rules of natural justice." (Emphasis added by me.)

Isaacs v. Robertson followed the decision in *Hadkinson v. Hadkinson* where the Court of Appeal held that an order of a Court of competent jurisdiction ought to be obeyed.

In *Standard Chartered Bank v. Central Provident Fund Board* [1989] 1 MLJ 268 the Court of Appeal of Singapore held that non-compliance with statutory requirements, going as it does to the root of the enforcement proceedings issued in the High Court, constitutes so fundamental a defect in procedure that it renders the entire proceedings in which it occurs, and any order made therein, a nullity. Likewise, in the present case the plaintiff was not incorporated pursuant to s. 16(5) of the Companies Act 1965 when the suit was filed and judgment taken. The judgment obtained by a non-existent company has formed the root of these present enforcement proceedings. Such enforcement proceedings must naturally fail. My view is that following *Pembinaan KSY* there is no distinction between an order which is a nullity and one which is irregular and curable under O. 2 r. l(l) of RHC in respect of enforcement of the orders as both orders may be enforced until and unless they are set aside whether in proceedings instituted for that purpose itself or whether in collateral proceedings. However, such orders may also be set aside *ex debito justitiae* in the exercise of the inherent jurisdiction of the Court without the person affected on the order needing to have recourse to proceedings expressly meant for that purpose.

Can a Proceeding or Order Which Is a Nullity Be Challenged In Collateral Proceedings?

Mr. Selva vehemently argues that this Court ought not at these proceedings, that is, at execution stage, look into the validity or otherwise of the judgments obtained. His submission was double-pronged. Firstly he submitted that no

collateral proceedings may be used to challenge an order properly obtained until it is set aside.

In a very recent decision, the Supreme Court in *Development & Commercial Bank Bhd. v. Aspatra Corp. Sdn. Bhd. & Anor. and Anor. Appeal* [1995] 3 MLJ 472 had occasion to review the law relating to challenging an order of Court by way of collateral proceedings. The facts of this case related to two appeals, one of which was:

Civil Appeal No. 02-497-92

In this appeal the learned Judge below upheld the order of the setting aside of a judgment in default of appearance dated 8 July 1986 obtained earlier by the plaintiff against the 2nd defendant who was sued as guarantor in respect of money lent by the plaintiff to the lst defendant. The 2nd defendant had first applied to set aside the default judgment before the learned Registrar and the learned Registrar had allowed it to be set aside, and on appeal, the learned Judge upheld the learned Registrar's order as stated above.

The learned Judge gave two main reasons for upholding the setting aside of the default judgment. The first reason was that the service on the 2nd defendant by way of order for substituted service was bad in law "because the order for substituted service was bad in law" and since the service effected in this manner was bad in law, the default judgment was also bad in law. It ought to be borne in mind that what came up for decision by both the learned Registrar and the learned Judge was for the setting aside of the default judgment and not for the order for substituted service or service in pursuant thereof to be set aside. The second reason was that the default judgment was for a sum more than what was actually due. Peh Swee Chin FCJ in delivering the judgment of the Supreme Court said at page 477:

> For our part, with great respect we were unable to agree with the learned Judge for deciding in this manner by brushing aside the order of substituted service, for the learned Judge was obviously considering the validity of the order of substituted service of the High Court dated 5 January 1986 when the same order was not a subject matter of an application before the learned Judge or for that matter, before the Registrar earlier for its discharge. The order of substituted service of the High Court, a superior Court of competent jurisdication, must be obeyed by everyone save in a few and rare exception and it can only be challenged as regards its validity by the only way of having it set aside by proceedings instituted for the very purpose. It cannot be challenged thus collaterally in any proceedings as regards its validity save in a very few care exceptions, (such as a Bankruptcy Court going behind a judgment of any Court on credibly raised issues of collusion, fraud, etc. only on hearing a bankruptcy petition), which all do not apply here. Please see *Pembinaan KSY v. Lian Seng Properties Sdn. Bhd.* [1991] 1 MLJ 100 SC*; Phuah Bee Hong v. Pentadbiran Tanah Daerah* [1994] 1 AMR 1427 SC; *Hadkinson v. Hadkinson* [1952] 21 AER 567. In this connection, it is immaterial that the said order of the High Court was

> actually made by the learned Registrar and not a High Court Judge. The learned Registrar should be considered notionally to be making the order as if he were a deputy High Court Judge.
>
> With great respect, the learned Judge was making a similar error as the learned Judge in *Pembinaan KSY, supra,* by adjudicating on the validity of the order of substituted service not in actual proceedings filed for the very purpose of having the order for substituted service or service in pursuance thereof set aside.

However the learned Judge went on to say at page 479:

> We agreed however with the learned Judge that the service and also order of substituted service were bad in law; they were irregular for the following reason. There is an established old principle that if a writ cannot be served personally at the time when the writ is issued, there cannot be subsequently any substituted service of the same writ, see *Fry v. Moore* [1889] 23 QBD 395), *Field v. Bennett* (56 LJ QB 89). But this was not the end of the matter, the question of waiver was raised and argued by the plaintiff.

What is of importance to note is that the *D&C Bank* case did not deal with an order that was considered a nullity. The Court very clearly held that the issue in question was one of irregularity. In the circumstances, I am respectfully of the view that the stricture regarding challenge on collateral proceedings ought not to bind the defendant in the present case.

Alternatively, I hold that the judgments in default obtained by a non-existent company would clearly fall within the "very few rare exceptions" envisaged by the Supreme Court. No doubt the Supreme Court gave some examples as to when challenge by way of collateral proceedings could be made and I hold that the present situation by analogy would fall well within these few rare exceptions. Thus on the authority of the *D&C Bank* case I hold that the defendants can challenge the judgments in default by way of collateral proceedings, namely by way of this application to set aside the writ of seizure and sale.

I therefore hold that notwithstanding the fact that Abdul Malek bin Hj. Ahmad J (as his Lordship then was) had dismissed the application I am bound both by authority and an the principle of *ex debito justitiae* to accept the submission of Encik Faiz during these collateral proceedings that the judgment obtained was a nullity and hold that since the judgments obtained were a nullity it follows therefore that the writ of seizure and sale which allegedly took its breath of life from a dead source fails *in limine* and ought to be struck out and or set aside.

The law is a living, breathing entity that draws its sustenance of life from the dictates of man's adaptability to his own chosen way of living. If I am to accept the submission of the plaintiff that the defendants, having failed to set aside the judgment obtained against them are to be precluded from challenging the validity or the very source of the said judgment, then indeed the law is

an ass as said by Charles Dickens in Oliver Twist. But that is not so. Justice must not only be done but be seen to be done. In its flexible and adaptable approach to the exigencies of situations the law from being dogmatic and rigid has accepted and adopted the principle of a challenge in collateral proceedings.

Law is not a stultiloquent five sensed animal. On the contrary it is created with a sense of purpose and imbued with the sixth sense of reason. From time immemorial the law of the land measured out justice with reason. It was not uncommon therefore that even where there seemed a dead-end in the law for a litigant the law created legal fictions to overcome the obstinacy of man's rigid-interpretation of that very same law itself. Law is reason and where injustice prevails the might and majesty of the law will grant redress to the needy and succour those in distress. No doubt therefore that it was appropriate and indeed right for the defendants in this case to challenge through the present collateral proceedings the very judgment which I hold was a nullity since I also find as a fact that Abdul Malek bin Hj. Ahmad J (as his Lordship then was) did not make a finding on the submissions made before him, whether the judgments in default ought to have been set aside on the grounds of nullity due to the fact that the plaintiff was not incorporated at the time the action was filed.

Inherent Jurisdiction of the Court

In *Che Wan Development Sdn. Bhd. v. Co-operative Central Bank Bhd.* [1989] 3 MLJ 40 N.H. Chan J (as his Lordship then was) held that the Court had no inherent jurisdiction to grant a stay of execution beyond the jurisdiction given by certain statutes or rules of Court. It is therefore appropriate at this stage to consider the procedural point taken by Mr. Selva who contended that the defendants could only, pursuant to O. 47 r. l(l) of the RHC, apply for a stay of execution. But this fallacious submission of the plaintiff begs the question that the defendants' application was under O. 47 r. 1(l). This is not the case. The application was not for a stay, but to strike out and (or) set aside the writ of seizure and sale. The question of special circumstances does not in any way arise.

In any event in *Chip Chong Sawmill Co. Sdn. Bhd. & Ors. v. Chai Khiun Fui* [1978] 2 MLJ 24 at 25 the then Federal Court said:

> ... Quite apart from and independent of all specific practice rules, the High Court has an inherent jurisdiction to dismiss or stay or otherwise nullify all actions or proceedings which are shown to its satisfaction to be vexatious or oppressive, or to constitute an abuse of its process.

In any event, it is my considered view that the guideline set by Chua J in the *Hongkong & Shanghai Banking Corp. v. Goh Su Liat Telecommunication Authority of Singapore, Garnishee* [1986] 2 MLJ 86 ought to apply. The

learned Judge held that the Court could hear a judgment debtor's application under its inherent powers and make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

Issue of Locus Standi

I must also consider the argument of the defendants that the plaintiff had no *locus standi.* I hold that in the present case and in all cases relating to nullity when either the proceedings themselves or the judgment itself is to be impugned, then the Court ought not to labour itself with considering this issue of *locus standi.* The Court's inherent power or set aside such proceedings and/or judgment ought to suffice. As to what *locus standi* is I can do no better than to adopt and thus follow the views of Idris Yusoff J in *Tengku Jaffar bin Tengku Ahmad v. Karpal Singh* [1993] 3 MLJ 159 when he said at page 161:

> In Malaysia, the question of *locus standi* has been the subject of a series of judicial interpretations after considering a good number of English authorities - it dates back to the English case of *Boyce v. Paddington Borough Council* ([1903] 1 Ch. 109). In *Karpal Singh v. Sultan of Selangor* ([1988] 1 MLJ 64), Abdul Hamid CJ (Malaya) (as he then was) elaborates on the concept of and the law on *locus standi.* He firmly says 'an action may not be brought to Court by a stranger to it'. He also explains the various approaches that may be adopted by the Court in deciding the question of *locus standi.* One approach is to ask whether the plaintiff has 'a cause of action'. Another approach is to determine whether the plaintiff can establish a 'right' which the Court may declare. Yet another approach is to require the plaintiff to demonstrate 'a special injury' resulting from the subject-matter of the declaration. A fourth approach requires the plaintiff to have an 'interest' in the subject-matter of the declaration to be litigated. A final approach leaves the question of standing to be determined by the Court in the exercise of its discretion.

I would hold that the plaintiff has failed each of the 5 tests enumerated by the learned Judge.

I therefore allowed the defendants' application to strike out and/or to set aside the writ of seizure and sale. Although the defendants had stated in their application that they intend to apply to strike out and to set aside the writ of seizure and sale I hold that the meaning and intent of either of the prayers is to prevent the plaintiff from executing on a judgment that was a nullity. Whether it is to strike out or to set aside, the result is the same. The plaintiff's unjust conduct would be stopped.

After I had ruled against the plaintiff in this case Counsel for the plaintiff enquired from me if I was making an order for costs for issuing the writ of seizure and sale. Mr. Selva insisted that he was entitled to costs for issuing out the writ of seizure and sale since it was based on the judgments in default. However since I had ruled that the judgment itself was a nullity I refused to

make any order in respect of costs for the plaintiff for issuing out the writ of seizure and sale, and instead ordered no order as to costs.

After I had delivered my judgment on 28 December 1995 I received a letter from the plaintiff's solicitors dated 29 December 1995 requesting for my grounds as the plaintiff had indicated his intention to appeal. However, the said letter put me on notice that one of the grounds of appeal was that there was an error on the face of the record.

As I could not see any logic or basis for such notice and thinking that I may have to deal with the said issue in my grounds of judgment, I directed my Deputy Registrar to write to the plaintiff's solicitors on 12 January 1996 as follows:

> Adalah saya diarah oleh Yang Arif Pesuruhjaya Kehakiman untuk merujuk kepada surat tuan SPCA6/01/92 bertarikh 29 Disember 1995.
>
> 2. Mahkamah ini tidak dapat memahami maksud tuan dalam perenggan ketiga surat tuan berkenaan dengan "Error on the face of the record". Oleh ini, sukacita sekiranya tuan dapat memberikan penjelasan berkenaan dengan perkara ini, sebelum Mahkamah ini dapat membekalkan tuan dengan nota-nota keterangan. Sekian, terima kasih.

There was no reply to the said letter. Since there was no reply and in order not to delay the grounds, I directed my Deputy Registrar to telephone the office of the plaintiff's solicitors on 18 January 1996. Subsequently Mr. Selva replied vide his letter dated 20 January 1996. His written reply merely stated that the 'error on the face of the record' will be one of his grounds of appeal to the Court of Appeal and he included a page from *Administrative Law* by H.W.R. Wade.

Duty of Counsel in the Conduct of a Trial

It is the paramount duty of a Counsel to conduct his case on behalf of his client with utmost candour. Whilst the Court will be prepared to overlook an indiscretion on the part of Counsel due to lack of experience or want of deliberate misconduct, any act by a solicitor suggestive of a course of conduct that leads to no other inference than a deliberate attempt to mislead ought to bring forth the full wrath of the Court.

Neither vaulting ambition nor a desire to succeed ought to motivate a solicitor to mislead. His paramount duty as an officer of the Court is to project a course of conduct that is irreproachable. Counsel ought not to have insisted that Abdul Malek bin Hj. Ahmad J (as his Lordship then was) had decided on an issue when in fact his Lordship had not, thus necessitating much time spent in checking old records to verify the truth of the matter.

In the circumstances, based on the law and facts, I allowed the defendants' application to set aside the writ of seizure and sale with costs, and made no order for costs of the issuance of the writ of seizure and sale as prayed for by the plaintiff.

Reported by Akbardin Hj. Abd. Kadir